Supreme Court, U.S.
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No. 10-87

In the

# Supreme Court of the United States

ROBERT M. MARDIROSIAN,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the unrepudiated bill of sale granted by the owner barred a criminal prosecution of the transferee for possession of stolen property under 18 U.S.C. § 2315.

2. Whether the district court's ruling, as a matter of law, that the defendant's title to the property was invalid and its refusal to submit to the jury the questions (i) whether the property remained "stolen" after he received a bill of sale from the owner and (ii) whether he subjectively believed he held title deprived him of his Fifth and Sixth Amendment rights to a jury determination of elements of the offense.

3. Whether, in determining the adjusted offense level under U.S.S.G. §2B1.1, the value of property that had been voluntarily returned to the owner long before the defendant's identity and offense were discovered should have been credited against the total loss.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

OPINION BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL, STATUTORY AND GUIDELINE PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 8

I. The Decision that Transfer of Title by an Owner to the Possessor of Stolen Property Is Void *Ab Initio* so as to Render Possession after the Transfer of Title a Crime Is So Far Contrary to Precedent and the Usual Course of Judicial Proceedings as to Warrant the Exercise of this Court's Supervisory Power. ..... 8

II. The First Circuit's Holding that Neither the "Stolen" Character of the Property nor Defendant's post-2002 Mens Rea Were Jury Questions Is in Conflict with This Court's Decision in *Morissette* and with the Second Circuit's Decision in *Schultz* and Deprived the Defendant of Due Process and his Right to Trial by Jury ..... 12

III. The First Circuit's Interpretation of the Credit-against-Loss Provision in §2B1.1 Conflicts with its Plain Language and Undermines the Policy Favoring Voluntary Restitution. . . . . 18

CONCLUSION . . . . . 20

APPENDIX

Appendix A: Opinion/Judgment, United States Court of Appeals for the First Circuit (Filed April 14, 2010) . . . . . 1a

Appendix B: Judgment in a Criminal Case, United States District Court District of Massachusetts (Filed December 16, 2008) . . . . 27a

Appendix C: Statutes
Restatement (Second), Conflict of Laws 2d, § 187 (rev. 1989) . . . . 40a
Restatement (Second), Contracts 2d, § 174 (1981) . . . . . 41a
Restatement (Second), Contracts 2d, § 175 (1981) . . . . . 41a
Restatement (Second), Contracts 2d, § 176 (1981) . . . . . 41a
Restatement (Second), Contracts 2d, § 176, Illustration 1 (1981) 42a
Swiss Code of Obligations, Contract Law, Art. 29-31 . . . . . 43a

## TABLE OF AUTHORITIES

### CASES

*Barlow v. United States*,
32 U.S. 404 (1833) ..... 14

*Cabot Corp. v. AVX Corp.*,
448 Mass. 629, 863 N.E.2d 503 (2007) ..... 9

*Continental Wall Paper Co. v. Louis Voight & Sons Co.*,
212 U.S. 227 (1909) ..... 10

*General v. State*,
367 Md. 475, 789 A.2d 102 (2002) ..... 16

*Hall v. Schoenwetter*,
239 Conn. 553, 686 A.2d 980 (1996) ..... 11

*Happ v. Corning*,
466 F.3d 41 (1st Cir. 2006) ..... 9

*Kaiser Steel Corp. v. Mullins*,
455 U.S. 72 (1982) ..... 10

*Kiely v. Raytheon Co.*,
105 F.3d 734 (1st Cir. 1997) ..... 10

*Liparota v. United States*,
471 U.S. 419 (1985) ..... 13, 14

*Mass. Municipal Wholesale Elec. Co. v. Town of Danvers*,
411 Mass. 39, 577 N.E.2d 283 (1991) ..... 10

*McMullen v. Hoffman*,
174 U.S. 639 (1899) ..... 10

*Morissette v. United States*,
342 U.S. 246 (1952) ..... 12, 13, 14

*Reese v. State*,
106 N.M. 498, 745 P.2d 1146 (1987) ..... 16

*United States v. Gaudin*,
515 U.S. 506 (1995) ..... 13

*United States v. Schultz*,
333 F.3d 393 (2d Cir. 2003) ... 12, 13, 14, 15, 16

**CONSTITUTION**

U.S. Const. amend. V ..... 1

U.S. Const. amend. VI ..... 1

**STATUTES**

18 U.S.C. § 2314 ..... 5

18 U.S.C. § 2315 ..... 2, 5

18 U.S.C. § 3231 ..... 1

18 U.S.C. § 3282(a) ..... 9, 17

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1291 ..... 1

**RULES**

U.S.S.G. §2B1.1 . . . . . 2, 6, 7, 18

**OTHER**

Restatement (Second), Contracts 2d § 174 (1981) . . 3

Restatement (Second), Contracts 2d § 175 (1981) 3, 9

Restatement (Second), Contracts 2d § 176 and illus. 1 (1981) . . . . . 3

Restatement (Second), Conflict of Laws 2d § 187 (rev. 1989) . . . . . 3, 7

Swiss Code of Obligations, Contract Law, Art. 29 - 31 . . . . . 3, 9

Robert M. Mardirosian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINION BELOW

The decision of the court of appeals is reported at 602 F.3d 1 and is reproduced in the Appendix at 1a - 27a. The district court did not issue memoranda of its decisions.

## JURISDICTION

The judgment of the court of appeals was issued on April 14, 2010. Pet. App. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

## CONSTITUTIONAL, STATUTORY AND GUIDELINE PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in part:

> No person shall be. . . deprived of life, liberty, or property, without due process of law; . . .

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, sec. 2315 provides:

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken; . . . Shall be fined under this title or imprisoned not more than ten years, or both.

Application note 3(E) to U.S.S.G. § 2B1.1 provides:

Credits Against Loss. – Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have

known that the offense was detected or about to be detected by a victim or government agency.

Other pertinent authorities, included in the Appendix hereto, are:

Restatement (Second), Conflict of Laws 2d, § 187 (rev. 1989);

Restatement (Second), Contracts 2d, §§ 174, 175, 176 and Illustration 1 to sec. 176 (1981);

Swiss Code of Obligations, Contract Law, Art. 29 - 31.

## STATEMENT OF THE CASE

In 1978, seven paintings were stolen from the home of Michael Bakwin in the Berkshires. Among them was Cézanne's still life *Bouilloire et Fruits*. The remaining six paintings were lesser works by less well-known Impressionist artists. The paintings were left on defendant Robert Mardirosian's premises by David Colvin, a client whom Mardirosian, a criminal defense lawyer, was representing in a federal investigation in Boston. Colvin was murdered nine months after the theft. About a year later, the defendant discovered the paintings in an attic where he had allowed Colvin to stay the night before a court appearance. In or about 1988, the defendant moved the paintings to Switzerland.

In 1999, Mardirosian, through a nominee corporation and a Swiss attorney, attempted to negotiate the return of all the paintings for a cash reward. In October 1999, Bakwin ultimately agreed,

not to pay a cash reward, but to give a bill of sale to the six lesser paintings in exchange for the return of the vastly more valuable Cézanne. The parties entered into a written agreement on October 25, 1999, pursuant to which the defendant signed a truthful declaration that he had nothing to do with the theft. The declaration, which was sealed and placed in escrow, disclosed his identity as principal of the nominee corporation. The written agreement recites that it is subject to Swiss law. Pursuant to the agreement, the Cézanne still life was returned to Bakwin's agent in the offices of his attorney in Geneva.

More than three weeks later, in London, Bakwin's agent executed a bill of sale to the remaining six paintings to Mardirosian's nominee and delivered it to Mardirosian's Swiss attorney. After the meeting, Bakwin's agent delivered the sealed declaration to Herbert Smith, a London law firm which acted as the parties' escrow agent and removed the six paintings from the Art Loss Register's registry of stolen works.[1] Mardirosian's identity was to remain secret unless and until Bakwin obtained a court order to release the declaration from escrow.

Almost immediately, Bakwin sold the Cézanne at auction for approximately $29.3 million. The value of the remaining six paintings to which the defendant was given a bill of sale was in the vicinity of $1 million – less than 4% of the value of the Cézanne. Bakwin took no action from 1999 to 2005 to invalidate the

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[1] The Art Loss Register is a for-profit organization whose founder and majority stockholder Julian Radcliffe acted as Bakwin's agent in negotiating the return of the Cézanne.

Swiss agreement or the bill of sale his agent had executed on his behalf. Nor did he seek to obtain the release of the sealed declaration from escrow in order to discover the identity of the holder.

In 2005, more than five years after the transfer of title, the defendant made plans to sell four of the paintings at auction in London, and toward that end, in April 2005, arranged for the transport of the paintings from Geneva to London. Only after the paintings were in London, one month before the June auction, did Bakwin's agent claim that the bill of sale had been executed under duress. Bakwin brought court proceedings to stop the auction and to unseal the escrowed declaration.

On March 8, 2007, a federal grand jury in the District of Massachusetts indicted the defendant on two counts. Count One alleged that the defendant possessed stolen property, to wit, the six paintings, in violation of 18 U.S.C. § 2315.[2] Count Two alleged that the transfer of the paintings from Geneva to London violated 18 U.S.C. § 2314.

A jury trial was held in August 2008, at the conclusion of which the court dismissed Count Two for failure to state an offense. Defendant moved for judgment of acquittal on Count One, which was denied after closing arguments.

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[2] The First Circuit's opinion states that the defendant was charged with criminal possession of the Cézanne (P. App. 2a), but, in fact, the indictment did not include possession of the Cézanne, which clearly fell outside the statute of limitations.

The defendant sought a jury instruction that the government must prove that the property remained "stolen" at the time of the offense, that is, between March 8, 2002, and April 11, 2005, and that the jury should determine the validity of the 1999 agreement under Swiss law. He also sought an instruction that the government must prove that the defendant subjectively knew that the paintings in his possession were still stolen property during the relevant period. Both requests were denied. Instead, the district court instructed the jury that the 1999 agreement was "illegal" and did not provide the defendant with a defense. The court instructed that it was of no moment whether the owner entered the contract voluntarily or under duress, and the jury was not to consider the issue – even though the terms of the contract had been fully performed by both parties. As to the element of knowledge, the court instructed the jury that it need only find that the defendant knew that the property had been stolen in or about 1978, and that it did not matter if the defendant believed he owned the property during the period of the offense.

On August 18, 2008, the jury returned a verdict of guilty on Count One. The defendant was sentenced on December 15, 2008, to an 84-month term of imprisonment, a three-year term of supervised release, a $100,000 fine, and return of the six paintings. In determining the guideline range under U.S.S.G. §2B1.1, the district court included the 1999 value of the Cézanne, $29.3 million, along with the value of the six paintings in the defendant's possession to reach a total of $30.2 million. The defendant contended that the value of the Cézanne should have been credited against the total loss pursuant to §2B1.1, application n. 3(E), because the Cézanne had been returned long

before the victim or law enforcement knew either the possessor's identity or that the possessor had committed any offense. The district court disagreed, ruling that the "offense" was known in 1978 and that return of any painting after the owner became aware of the theft did not qualify for the credit. Accordingly, the court enhanced the base offense level 22 levels for loss, rather than the 14 levels applicable to a loss between $400,000 and $1 million. U.S.S.G. §2B1.1(b)(1)(H). The guideline range was determined, based on an adjusted offense level of 32 and criminal history category I, to be 121 to 151 months, which exceeded the ten-year maximum penalty.

On appeal, the First Circuit ruled that the 1999 agreement and bill of sale were void *ab initio* as a contract undertaken for an illegal purpose and therefore "had no bearing on the 'stolen' character of the paintings or on whether Mardirosian possessed the requisite mens rea to be convicted under 18 U.S.C. § 2315." Pet. App. 16a.[3] The court upheld the district court's refusal to submit either issue to the jury and deemed the evidence sufficient to support the verdict. With respect to the defendant's sentencing claim, the court ruled that the credit against loss is available only if the property is returned before either the victim or law enforcement becomes aware of the crime, even if the identity of the perpetrator remains unknown. The court endorsed the district court's view that the offense was detected in 1978 when Bakwin discovered

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[3] In so ruling, the court failed to apply Swiss law which governs the contract under American conflict-of-laws principles and by its terms. Restatement (Second), Conflict of Laws 2d, § 187 (rev. 1989); Pet. App. 40a.

that his paintings were stolen, and not in 2005 when the escrowed declaration was opened and both law enforcement and the previous owner learned that Mardirosian held the paintings. The court also agreed that the Cézanne's value in 1999 rather than 1978 was the appropriate measure of loss. Pet. App. 24a.

## REASONS FOR GRANTING THE WRIT

I. The Decision that Transfer of Title by an Owner to the Possessor of Stolen Property Is Void *Ab Initio* so as to Render Possession after the Transfer of Title a Crime Is So Far Contrary to Precedent and the Usual Course of Judicial Proceedings as to Warrant the Exercise of this Court's Supervisory Power.

This case pits long-established and internationally recognized principles governing the validity of contracts with defects in formation against the federal statute making criminal the knowing possession of stolen property. Contrary to well-settled principles of contract, prevailing nationwide and abroad, the lower courts in this case ruled that an owner of property that had been stolen may not validly transfer title to a small portion of that property to a possessor who seeks a reward for its return. The court's holding subjects the transferee to criminal prosecution for possession of "stolen" property long after the statute of limitations expired on both the pre-transfer possession and the transaction transferring title – without regard to whether the transfer was procured by duress or was entirely voluntary.

In ruling the bill of sale void, the court ignored well-settled law in both the United States and in

Switzerland, where the 1999 contract was made and executed, that a defect in the formation of contracts renders a contract merely voidable and not void *ab initio*. *See* Restatement (Second), Contracts 2d § 175 (1981); Swiss Code of Obligations, Contract Law, art. 29-31. In order to invalidate a contract, one party to it must take timely action and must demonstrate that the contract was entered into under circumstances which render the contract voidable, such as extortion or duress.

In 2007 when this prosecution was commenced, Bakwin was time-barred from seeking to invalidate the transfer under both Swiss law and Massachusetts law. Under art. 31 of the Swiss Code of Obligations, which governs the contract at issue, a party whose consent was subject to error, deception, or duress has one year in which to declare the contract void. If he does not do so, the contact is deemed ratified. Pet. App. 44a. Domestic law is not materially different. *See Happ v. Corning*, 466 F.3d 41, 44 (1st Cir. 2006)(applying Massachusetts law); *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 643-44, 863 N.E.2d 503, 515-16 (2007) (contract not voidable for economic duress where defendant accepted benefits under the contract and did not claim duress until 18 months later). Since Bakwin took no steps to invalidate the contract within the period allowed under Swiss law, or indeed, even within the five-year statute of limitations applicable to a criminal charge of possession under federal law,[4] Mardirosian held valid title and could not be prosecuted for criminal possession.

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[4] 18 U.S.C. § 3282(a)

In ruling that the transfer of title was illegal and against public policy, the First Circuit misinterpreted this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), in which the Court held that a coal producer sued on a contract to make contributions to union health and retirement funds on the basis of "purchased coal" could raise illegality of the contract as a defense. The First Circuit also relied on other civil cases that hold that contracts for an illegal purpose are void *ab initio* and are therefore not enforceable. *See McMullen v. Hoffman*, 174 U.S. 639 (1899)(secret agreement between bidders on a public contract is illegal and unenforceable); *Kiely v. Raytheon Co.*, 105 F.3d 734, 736 (1st Cir. 1997)(an agreement to achieve mutual benefit from the parties' cooperative violation of the law is void and unenforceable as against public policy); *cf. Mass. Municipal Wholesale Elec. Co. v. Town of Danvers*, 411 Mass. 39, 55, 577 N.E.2d 283, 293 (1991)("The consequences of voiding a contract ab initio for illegality, however, must be linked to the considerations of fairness and public policy."). *See also Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909)(illegal contract of combination in violation of anti-trust laws is unenforceable). All such cases arose in the context of civil actions to enforce the obligations of a party to the contract; they did not arise in the context of a criminal prosecution predicated on disregarding the parties' completed performance of their agreement.

The First Circuit failed to distinguish between contracts the performance of which is illegal and contracts with a defect in formation. Even if it was unlawful for the defendant to seek a reward for returning the Cézanne, it was not illegal for the owner

to give a reward. The only issues with respect to the enforceability of such a contract are whether the reward was given under duress or some other infirmity in the formation of the contract, and whether the owner sought rescission in a timely fashion.

There is no public policy against an owner giving a reward for the return of stolen property. *See, e.g. Hall v. Schoenwetter*, 239 Conn. 553, 686 A.2d 980 (1996), where the Connecticut Supreme Court resolved a dispute over a reward paid for the return of a stolen Stradivarius. The Court ruled that even if the decedent had stolen the violin, his estate was entitled to the reward, rather than the executrix who had negotiated the reward in exchange for returning the violin. The reasoning of the First Circuit is in direct conflict with the Connecticut Supreme Court's holding. Under the First Circuit's rationale and holding, neither party would be entitled to the reward, the payment of which would be illegal as contrary to public policy.

This is the only case of which petitioner is aware where a court has held that even a voluntary transfer of title to property by the owner of that property is void *ab initio*.[5] It is the only case in which a transfer was first declared illegal in a criminal proceeding, thereby depriving the defendant of the defense that he possessed the property under color of title before the title was declared void. The defendant is aware of no

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[5] The jury was not permitted to consider whether the contract was procured voluntarily or under duress. There was compelling evidence that the deal was negotiated at arm's length and was not coerced, in particular, the fact that the bill of sale was executed over three weeks after the Cézanne was returned.

other case in which a defendant has been convicted for possession of stolen property where he held undisturbed title to the property in his possession, and where there was no prior judicial determination that the transfer of title was invalid on the grounds of duress or otherwise. The procedure the First Circuit upheld in this case is so far contrary to precedent and principle as to call for an exercise of this Court's supervisory power.

II. The First Circuit's Holding that Neither the "Stolen" Character of the Property nor Defendant's post-2002 Mens Rea Were Jury Questions Is in Conflict with This Court's Decision in *Morissette* and with the Second Circuit's Decision in *Schultz* and Deprived the Defendant of Due Process and his Right to Trial by Jury.

Defendant requested and was refused a jury instruction as to whether the bill of sale executed in 1999 gave him title to the paintings in his possession so that they were no longer "stolen" during the relevant period. He also requested and was refused a jury instruction that if he believed that he held title to the paintings, then he could not be found guilty even if he were mistaken about title. The court's rulings as a matter of law that the defendant's color-of-title defense was invalid and that, with respect to mens rea, the government needed to prove only that the defendant knew that the paintings had been stolen at some time, deprived him of his rights to due process and to a jury determination of all elements of his offense as guaranteed by the Fifth and Sixth Amendments. Those provisions of the constitution require that every element of the crime be determined

by a jury. *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995).

This Court should grant the petition because the First Circuit has decided an important federal question in a way that conflicts with relevant, analogous decisions of this Court. The First Circuit's decision upholding the district court's refusal to submit the questions whether the property was still "stolen" after the 1999 transfer and whether the defendant subjectively believed, from 2002 to 2007, that he held title to the property contravenes this Court's holding in *Morissette v. United States*, 342 U.S. 246 (1952), and disregards the analogous holding and reasoning of *Liparota v. United States*, 471 U.S. 419 (1985). It also is in direct conflict with the Second Circuit's decision in *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

In *Morissette*, the defendant had been convicted of conversion in violation of 18 U.S.C.§ 641 as a result of removing spent bomb casings from government-owned land. The Court held that the question whether the defendant subjectively believed that the casings were abandoned presents a jury question, and that intent to convert may not be presumed from the intentional taking of the property. 342 U.S. at 274-75. In *Liparota v. United States*, the Court considered whether the government was required to prove that the defendant intended to commit food stamp fraud. In ruling that the rule of lenity required the government to prove specific intent, the Court analogized to stolen-property cases, explaining that, while ignorance that receipt of stolen goods is illegal is not a defense, ignorance of the legal status of the goods as stolen is a mistake of fact.

> It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7 U.S.C.] § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It is, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a § 2024(b)(1) violation that one did not know that one's possession was unauthorized.

471 U.S. at 426 n.9.

The First Circuit did not even cite, much less distinguish, *Morissette* or *Liparota*. Instead, the court cited *Barlow v. United States*, 32 U.S. 404, 411 (1833), which is not a mistake-of-fact case, but rather stands for the proposition that a mistake of law is no defense. Mistake of law is not at issue here; rather, the fact question for the jury was whether the defendant knew that his title to the goods was invalid before any authority had declared it to be invalid.

In *Schultz*, which the First Circuit erroneously distinguished, the Second Circuit held that, while the defendant was entitled to defend a National Stolen Property Act case on the ground that he did not know that Egyptian patrimony law rendered the goods he attempted to smuggle "stolen", he could not avoid criminal responsibility on the ground that he did not understand that the NSPA would apply to such goods.

> A defendant charged with violating the NSPA may argue that he did not know a certain fact

> that made his conduct criminal, that is, that he did not know the objects in question were stolen. Schultz's "mistake of Egyptian law" defense goes to that issue. However, if a jury finds that a defendant knew all of the relevant facts, the defendant cannot then escape liability by contending that he did not know the law.

333 F.3d at 411. The First Circuit distinguished this holding on the ground that the mistake-of-fact defense applies only if the defendant is wholly innocent, "not morally culpable." Pet. App. 14a. The First Circuit panel reasoned:

> In *Schultz* – as in other mistake-of-fact cases – the defendant argued that his conduct was at all times innocent and that he never possessed the requisite mens rea to be guilty of the charged crime.

Pet. App. 13a. In fact, the defendant in *Schultz* did not make such an argument and the Second Circuit's decision does not turn on a distinction between mistakes that are "wholly innocent" and those that are not. To the contrary, the Second Circuit noted in some detail that Schultz's conduct was *not* innocent: he had conspired to smuggle the goods from Egypt, he was engaged in a scheme to defraud potential buyers, he and his co-conspirators had spoken in code and expressly contemplated that they might be imprisoned, etc. In short, *Schultz* hardly stands for the proposition that a defendant who seeks to assert a mistake-of-fact defense and a jury determination of his mens rea must be wholly innocent of wrongdoing. Quite to the contrary, Schultz was permitted to raise the very defense that Mardirosian was not permitted to raise:

that he did not believe the goods in his possession were stolen. Thus, the cases are in direct conflict.

Not only did the First Circuit misread *Schultz*, but its notion that a defendant is entitled to a mistake-of-fact defense and to trial by jury on the issue of mens rea if and only if "his conduct was at all times innocent" is unprecedented. None of the cases the First Circuit relied upon supports such a distinction; indeed, several of the cases the court cites demonstrate the opposite, that is, that the defendant indeed did something morally culpable, but was unaware of some fact concerning legal status essential to the particular offense with which he was charged. *See, e.g.*, *Reese v. State*, 106 N.M. 498, 745 P.2d 1146 (1987) (defendant not guilty of assaulting a police officer if he believed the victim was an ordinary citizen because the offense required knowledge that the victim was a police officer), cited at Pet. App. 13a-14a. Plainly, a defendant who assaults a police officer believing that he is assaulting an "ordinary citizen" is entitled to a mistake-of-fact defense not because he is "not morally culpable" and not because "his conduct was at all times innocent", but because his mistake as to the legal status of his victim is a mistake of fact material to the crime charged. *See also General v. State*, 367 Md. 475, 789 A.2d 102 (2002) (defendant charged with failing to remain at the scene of an accident resulting in injury or death was entitled to introduce defense that he believed he had struck a white bag and not a person.), cited at Pet. App. 13a. Obviously, a person who leaves the scene of an accident is not wholly innocent; his ability to mount a defense on mens rea grounds is not conditioned on meeting such a test.

The extraordinary and novel notion advanced by the First Circuit in this case that a mistake-of-fact defense may not be raised "once all elements of the crime have been met" begs the question: what crime? The elements of the crime charged, possession of stolen property after March 8, 2002 were met only if the court eliminated two elements: that the property was still "stolen" and that the defendant, who held unchallenged title to it, knew it. That the defendant may or may have not have committed some other uncharged offense is simply irrelevant to whether he had the right to have a jury decide the elements of the offense with which he was charged. The issue whether the 1999 transfer altered the legal status of the paintings and the defendant's belief about their legal status is not affected by conduct prior to that transfer and the defendant should not have been deprived of his only meaningful defenses on the basis of such conduct.

Finally, the First Circuit advanced a policy rationale for its ruling: that a defendant might try to contract his way out of an offense and then raise mistake-of-fact as a defense. This fear is unfounded. Had the government sought to file charges with respect to the pre-transfer period of possession, the 1999 transfer would have posed no impediment. Such a charge could have been brought up to five years after the transfer. 18 U.S.C. § 3282(a). It was not. The First Circuit's ruling endorsing an instruction to the jury to ignore the effect of the transfer of title in 1999 on the defendant's subjective belief effectively permits the prosecution to avoid the statute of limitations.

## III. The First Circuit's Interpretation of the Credit-against-Loss Provision in §2B1.1 Conflicts with its Plain Language and Undermines the Policy Favoring Voluntary Restitution.

The defendant's sentence was driven by a loss calculation that included the astronomical value of the painting he returned years before his offense and identity were discovered. The court's interpretation of the commentary to U.S.S.G. §2B1.1 applicable to credits to be applied against the loss calculation defies the plain language and meaning of the guideline commentary. Because the decision is unmoored to the language or policy rationale for the credit, it presents an important question of law that this Court should resolve.

Pursuant to application note 3(E) to §2B1.1, the loss in this case should have been reduced by the value of the Cézanne because Mardirosian returned it before anyone knew his identity or that he had committed any offense. In 1999 when Mardirosian returned the Cézanne, neither Bakwin nor law enforcement knew either Mardirosian's identity nor the circumstances under which the then-current holder had come into possession.

The First Circuit's ruling that the offense was discovered in 1978 when Bakwin learned that his paintings were stolen (*see* Pet. App. 21a) is clearly erroneous. The "offense" at issue is not the theft of the paintings, with which the defendant was not involved, but the possession of the paintings, with knowledge that they had been stolen, after they had been transported across a state or national boundary. That offense did not even occur until in or about 1988, and

was not discovered until well after the return of the Cézanne, that is, when both the identity of the possessor and the circumstances under which he came into possession of the paintings became known. That was January 2006, at the earliest. Under the First Circuit's reading of the application note, the possibility of a credit against loss evaporated even before Mardirosian came into possession of the paintings.

The First Circuit's interpretation of application note 3(E) to eliminate the availability of a credit against loss unless the property is returned before the victim is even aware of the theft not only plainly misreads the rule, it is irrational and serves no conceivable policy interest. The clear policy underlying the credit is to encourage defendants to make voluntary restitution before it serves their penal interests to do so. Closing the credit-against-loss window before Mardirosian even came into possession both runs counter to that policy and is an irrational interpretation of the guideline.

Crediting the value of the painting Mardirosian returned voluntarily was not only required by the Guideline, but, contrary to the First Circuit's opinion, works no injustice. The fact is that he returned property worth $29.3 million in exchange for title to property worth less than $1 million at a time when no one was close to discovering his identity or the whereabouts of the paintings. He did so before he was under any compulsion to do so and before it served his penal interests to do so. That he did so after Bakwin knew of the original theft is of no moment because Mardirosian had no role in the theft.

Finally, the court's interpretation favors white-collar embezzlers, who contrive to conceal their defalcation, over street criminals who rob banks or commit larceny from the person, who may succeed in hiding their identity but not the loss. In either case, a voluntary return of property before the offender is identified should effect the same credit against loss.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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JULY 2010

# APPENDIX

## TABLE OF CONTENTS


Appendix A: Opinion/Judgment, United States Court of Appeals for the First Circuit (Filed April 14, 2010) . . . . . 1a

Appendix B: Judgment in a Criminal Case, United States District Court District of Massachusetts (Filed December 16, 2008) . . . . 27a

Appendix C: Statutes
Restatement (Second), Conflict of Laws 2d, § 187 (rev. 1989) . . . . 40a
Restatement (Second), Contracts 2d, § 174 (1981) . . . . . 41a
Restatement (Second), Contracts 2d, § 175 (1981) . . . . . 41a
Restatement (Second), Contracts 2d, § 176 (1981) . . . . . 41a
Restatement (Second), Contracts 2d, § 176, Illustration 1 (1981) 42a
Swiss Code of Obligations, Contract Law, Art. 29-31 . . . . . 43a

## APPENDIX A

**United States Court of Appeals**
**For the First Circuit**

**No. 09-1144**

**[Filed April 14, 2010]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Appellee, | ) |
| | ) |
| v. | ) |
| | ) |
| ROBERT M. MARDIROSIAN, | ) |
| | ) |
| Defendant, Appellant. | ) |
| | ) |

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
[Hon. Mark L. Wolf, U.S. District Judge]

Before

Lynch, Chief Judge,
Torruella and Howard, Circuit Judges.

Jeanne M. Kempthorne for appellant.
Jonathan F. Mitchell, Assistant United States Attorney, with whom Michael K. Loucks, Acting

United States Attorney and Ryan M. DiSantis, Assistant United States Attorney, were on brief, for appellee.

April 14, 2010

**HOWARD, Circuit Judge**. Defendant-Appellant Robert M. Mardirosian was convicted by a jury of one count of possessing, concealing or storing six stolen paintings, including a rare Cézanne valued at $29 million, in violation of 18 U.S.C. § 2315. On appeal, Mardirosian argues that there was insufficient evidence for the jury to conclude that he possessed stolen property during the applicable five-year statute of limitations period, because the owner had given him legal title to the paintings in a 1999 agreement. Even if the agreement was invalid, Mardirosian contends, he subjectively believed that he held title to the paintings after 1999 and thus the government could not prove he knowingly possessed stolen property, as required by § 2315. Mardirosian further claims that the district court erred in instructing the jury that this agreement did not provide him with a viable mens rea defense to the charge. He also appeals his sentence, alleging errors in the application of the Sentencing Guidelines. Finding no error, we affirm.

## I. Facts

For purposes of the sufficiency challenge, we recite the facts in the light most favorable to the verdict. United States v. Marin, 523 F.3d 24, 27 (1st Cir. 2008). Just after Memorial Day weekend in 1978, Michael and Doris Bakwin discovered that seven valuable

paintings had been stolen from their Stockbridge, Massachusetts home -- including two portraits by Chaim Soutine and a still-life by Paul Cézanne.[1] Michael Bakwin advertised a $25,000 reward in regional newspapers for the return of the paintings, and state and federal authorities launched an investigation. The focus soon narrowed to a small group of suspects, including David Colvin of Pittsfield, Massachusetts.

During the investigation, Mardirosian, a criminal defense attorney, was representing Colvin in an unrelated firearms case. Although Mardirosian did not testify at his own trial, he had presented his version of how he came into possession of the paintings in a 2006 interview with a Boston radio station. The jury heard a tape of the interview, in which Mardirosian claimed that, on the day before a hearing in Colvin's firearms case, Colvin appeared at Mardirosian's office for a meeting carrying a bag containing the seven paintings stolen from the Bakwin home. According to Mardirosian, Colvin said he planned to sell the paintings, but Mardirosian convinced him not to do so. At the end of the meeting, Colvin asked Mardirosian to help him find a place to spend the night. Mardirosian directed Colvin to the loft of an office building that Mardirosian owned.

The following day, Colvin pleaded guilty to the firearms charge and was sentenced to one year of

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[1] The paintings were Bouilloire et Fruits by Paul Cézanne, Portrait d'une Jeune Fille and Portrait d'un Jeune Homme by Chaim Soutine, Maison Rouge by Maurice Utrillo, Flowers by Maurice de Vlaminck, and Woman Seated and Boy by Jean Jansem.

probation. In February 1979, he was shot and killed. The investigation into the art theft stalled.

Some months after Colvin's death, while cleaning out the loft where Colvin had stayed, Mardirosian happened upon the bag of paintings. He chose not to contact Bakwin or law enforcement, but rather began investigating how to profit from his discovery. Mardirosian first researched whether he might obtain insurance proceeds for the return of the paintings, but rejected the idea because the most valuable painting, the Cézanne, was not insured. It is unclear what Mardirosian did next with the paintings, but in 1988 he had the paintings shipped out of the United States and, at some point thereafter, stored them in the vault of a major Swiss bank.

It was only in 1999, through Mardirosian's botched attempt to sell the Cézanne in London through a third-party representative, that authorities picked up the trail of the missing paintings. Tony Westbrook, a British citizen acting on Mardirosian's behalf as the anonymous holder, had contacted Lloyd's of London to try to insure the shipment of the Cézanne from Russia to London in preparation for sale. The inquiry prompted Lloyd's to alert the Art Loss Register (ALR), a London-based organization that maintains a database of stolen artwork and verifies the provenance of art for private collectors and major auction houses. The ALR confirmed that the Cézanne was the same painting stolen from Bakwin's home in 1978. It notified British authorities and the FBI, and then signed an agreement with Bakwin whereby the ALR would attempt to recover all seven stolen paintings in exchange for a commission.

The ALR approached Westbrook to see if it could determine the identity of the mysterious seller and arrange for the paintings' return. Westbrook, who claimed to receive his marching orders by telephone from an anonymous caller, said he knew only that the holder of the paintings had an American accent and insisted on anonymity.

In March 1999, Mardirosian, through Westbrook, demanded $15 million for the return of the paintings. Bakwin refused. Mardirosian renewed his demand for payment in August 1999 through a new agent, Swiss lawyer Bernard Vischer. Vischer informed the founder and chairman of the ALR, Julian Radcliffe, that the holder of the paintings was looking for a payment in the "millions of dollars." Vischer threatened that "his client would take the pictures away and hang them on his wall if we didn't do a deal." Bakwin again refused.

By this time, Bakwin was losing faith that he would be able to recover his paintings through negotiations. He reluctantly agreed to convey six of the paintings, together worth about $1 million, to the anonymous holder in exchange for the return of the Cézanne. As part of the agreement, the ALR insisted that the paintings' anonymous holder complete an affidavit confirming that he was not involved in the original theft. The parties agreed that the affidavit would be held in escrow by Herbert Smith, a London-based law firm, and that it would be opened only if required by court order.

On October 25, 1999, Vischer and Radcliffe met in Geneva to execute the agreement (hereinafter the "1999 Agreement"), accompanied by attorneys and experts from Sotheby's who could verify the painting's

authenticity. Vischer spoke with someone on his cell phone, and then announced that he would retrieve the Cézanne and bring it to the boardroom. He left the room and headed to the front of the building, with Radcliffe and the others in tow. Once outside, Vischer walked to a nearby corner. A white car pulled up beside him, and the back passenger window lowered. A passenger in the backseat, his face shrouded from view, handed Vischer a black trash bag. The car sped away. Vischer returned to the boardroom and handed the trash bag to the experts from Sotheby's, who carefully opened it to reveal the stolen Cézanne.

The Cézanne's authenticity confirmed, Radcliffe signed the agreement on behalf of the Art Loss Register. Vischer signed on behalf of the "Erie International Trading Company," a Panamanian Corporation formed to hold title to the six paintings for Mardirosian as the anonymous holder. On November 16, 1999, Radcliffe provided Vischer with a bill of sale that purported to deed title to the paintings and told Vischer that the ALR's records would reflect that title to the six stolen paintings had passed to the holder by settlement.

Bakwin sold the Cézanne in December 1999 for $29.3 million. Discussions regarding the remaining six paintings continued. In early 2000, Vischer told Radcliffe that the anonymous holder would be willing to sell the paintings to Bakwin for $1 million. Bakwin refused. Vischer dropped the demand to $500,000. Bakwin remained adamant that he would not pay any cash to the anonymous holder. Talks between the parties broke off.

Three years later, Mardirosian again sought to sell the six paintings, this time to a private buyer. In December 2003, he approached Paul Palandjian, a Boston-based real estate developer and family friend. Mardirosian told Palandjian that the paintings had been stolen, but that he had received title as part of a valid contract. Palandjian later agreed to represent Mardirosian as the anonymous holder for the purpose of selling the paintings.

Palandjian contacted Sotheby's to gauge the auction house's interest in the paintings. Sotheby's knew of the paintings' history and was intrigued, but it wanted to view them and verify title before it agreed to include them in its next Impressionist art auction. Palandjian and Mardirosian began making arrangements to meet Sotheby's demands. Palandjian flew to Geneva, where Mardirosian had arranged for a friend to deliver the paintings to Palandjian's hotel room. Palandjian then took the paintings to a Sotheby's representative at the Geneva offices of Bank Sarasin for inspection.

Sotheby's ultimately made an offer to sell four of the six paintings. In January 2005, it contacted the ALR to check the status of the paintings' title. Radcliffe immediately saw an opportunity to seize the paintings when they arrived in London for auction. If he told Sotheby's the paintings were stolen, however, he worried that word could get back to the seller, who then would not ship them. Radcliffe thus told Sotheby's that the titles of the paintings were cleared for sale.

Relying on the ALR's assurances, Palandjian authorized Sotheby's to ship the paintings from

Geneva to London in April 2005. In May 2005, with the paintings safely on British soil, Bakwin sued Sotheby's to enjoin their sale. The British court ordered Sotheby's to return the paintings to Bakwin, and it directed the parties to open the envelope held in escrow at Herbert Smith.[2] In January 2006, the 1999 affidavit was unsealed, identifying Mardirosian as the anonymous holder.

On March 8, 2007, a grand jury indicted Mardirosian on two counts. Count One alleged that from 1978 to 2005, Mardirosian possessed stolen property that had crossed a United States boundary in violation of 18 U.S.C. §§ 2315 and 2. Count Two charged Mardirosian with causing four of the paintings to be transported in foreign commerce from Geneva, Switzerland to London, England in violation of 18 U.S.C. §§ 2314 and 2.[3] On August 18, 2008, the sixth day of trial, the jury convicted Mardirosian on Count One. The district court subsequently sentenced Mardirosian to seven years' imprisonment and three years of supervised release; it also ordered him to pay a $100,000 fine and to return the stolen paintings.

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[2] The district court excluded from evidence any reference to the British lawsuit, but it allowed the jury to hear about the halting of the sale and unsealing of the affidavit.

[3] The district court dismissed the second count at trial for failure to state an offense, on the grounds that "foreign commerce" did not include commerce between two foreign countries. The parties do not appeal this ruling.

## II. Discussion

### A. Sufficiency of the evidence

To support a conviction under 18 U.S.C. § 2315, the government must prove beyond a reasonable doubt that (1) the property was stolen; (2) after the property was stolen, it crossed a United States boundary; (3) the defendant possessed, concealed, or stored the property; (4) the defendant knew the property was stolen; and (5) the property was worth $5,000 or more. United States v. Tashjian, 660 F.2d 829, 839 (1st Cir. 1981).

We review insufficiency claims de novo, "eschewing credibility judgments and drawing all reasonable inferences in favor of the verdict, to ascertain if a rational jury could have found that the government proved each element of the crime beyond a reasonable doubt." United States v. Sepulveda, 15 F.3d 1161, 1173 (1st Cir. 1993).

Mardirosian does not dispute that he possessed the stolen paintings in violation of the statute from 1978 to 1999. The crux of his argument is not that his actions were entirely innocent, but rather that the 1999 Agreement ended his ongoing possession offense, triggering the five-year statute of limitations under 18 U.S.C. § 3282(a). The effect of the 1999 Agreement was twofold, he avers. First, in light of this agreement, the government could not prove beyond a reasonable doubt that the paintings remained "stolen" after March 8, 2002, the five-year statute of limitations period leading up to the indictment. Second, Mardirosian contends that the government failed to prove that he knew that the paintings were stolen, because Mardirosian believed that the 1999

Agreement gave him title. We consider these arguments in turn.

**1. The "stolen" character of the paintings**

Mardirosian urges us to consider the circumstances surrounding the 1999 Agreement's formation in determining its validity. If we determine that duress did not play a role in the transaction, he argues, we should hold that the Agreement was a valid contract that ended his unlawful possession. We need not undertake this analysis, however, because we agree with the district court that the 1999 Agreement was void ab initio as a contract for an illegal purpose.

It is well-established that contracts for illegal purposes are void as a matter of public policy. See, e.g., Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982) ("There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law."); Kiely v. Raytheon Co., 105 F.3d 734, 737 (1st Cir. 1997) ("[C]ourts will not lend their aid to relieve parties from the results of their own illegal adventures."). State common law is the same. When a contract is void ab initio, the contract "may not be enforced," and the court will treat the contract "as if it had never been made." Mass. Wholesale Elec. Co. v. Town of Danvers, 577 N.E.2d 283, 292–93 (Mass. 1991).

The 1999 Agreement was illegal in that Mardirosian conditioned the return of the stolen Cézanne on Bakwin's relinquishment of title to the six remaining paintings. We tread no new ground in declaring that the act of demanding a fee for the

return of stolen property is unlawful. See, e.g., Commonwealth v. Valleca, 263 N.E.2d 468 (Mass. 1970) (defendant convicted of receiving stolen property where he demanded a fee in exchange for property's return); Slaughter v. State, 38 S.E. 854, 855 (Ga. 1901) (finder of property would be guilty of larceny if he concealed the property for the purpose of returning it once a reward had been offered); Dunn v. State, 30 S.W. 227 (Tex. 1895) (taking of property with intent to conceal it until a reward is offered is larceny); Berry v. State, 31 Ohio St. 219 (1877) (same); Commonwealth v. Mason, 105 Mass. 163 (1870) (defendant who kept neighbor's horse until a reward was offered was guilty of larceny).

Mardirosian warns that holding such bald demands for payment to be void ab initio would curtail the ability of rightful owners to freely transfer their property and would cause subsequent owners of once-stolen goods to violate 18 U.S.C. § 2315 simply by taking possession of the property. Neither observation is accurate, and in any event the facts of this case do not even arguably suggest that the paintings did not remain stolen during the post-Agreement period. The paintings were not returned or proffered to the victim upon acquisition by the possessor, even, for example, in response to an offered reward; indeed the reward had been long since retracted. The painting was returned only on a demand for payment as outlined in the Agreement.[4]

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[4] We reject Mardirosian's argument, raised for the first time on appeal, that, in light of the court's invalidation of the 1999 Agreement, 18 U.S.C. § 2315 did not provide fair warning that Mardirosian's conduct was illegal, as required by the Due Process Clause of the Fifth Amendment. The notion that a contract for an

## 2. Mardirosian's knowledge that the paintings were stolen

Mardirosian also argues that even if the 1999 Agreement was void, he subjectively believed it gave him title to the six paintings. Thus, he contends, the government could not prove that he possessed the requisite knowledge that the property was stolen to be convicted under 18 U.S.C. § 2315. This argument requires us to consider the boundaries of the mistake-of-fact doctrine.

It is a basic principle of criminal law that "ignorance or mistake of fact may provide a defense to a crime if it negates the requisite element of intent . . . ." United States v. Fuentes-Moreno, 895 F.2d 24, 27 (1st Cir. 1990). In the classic example, a man who takes another's umbrella home from a restaurant under the mistaken impression that the umbrella is his is not guilty of larceny because he does not intend to steal another's property, and thus does not have the requisite state of mind to be guilty of the crime. Wayne R. LaFave, Criminal Law § 5.1 (3d ed. 2000).

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illegal purpose is void ab initio is by no means novel, nor is 18 U.S.C. § 2315 ambiguous merely because it does not specifically characterize the property obtained through such an unlawful negotiation as "stolen." Due process does not require that criminal statutes delineate every conceivable type of conduct that could come within their purview. See United States v. Lanier, 520 U.S. 259, 271 (1997) (due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited").

Mardirosian asserts that his mistaken belief that the paintings were his, if true, would create a legitimate mistake of fact that would absolve him of the crime. He relies on United States v. Schultz, 333 F.3d 393 (2d Cir. 2003). In Schultz, a defendant charged with smuggling Egyptian artifacts into the United States claimed that he did not know that the objects were "stolen" under Egyptian patrimony law. The Second Circuit affirmed a jury instruction that the defendant's knowledge of Egyptian law might bear on his knowledge that the artifacts were stolen. Id. at 410 n.11, 411.

Mardirosian overlooks a crucial and dispositive distinction between Schultz and this case, however. In Schultz -- as in other mistake-of-fact cases -- the defendant argued that his conduct was at all times innocent and that he never possessed the requisite mens rea to be guilty of the charged crime. Id. at 410.; see also U.S. v. Smith-Baltiher, 424 F.3d 913 (9th Cir. 2005) (defendant charged with attempted illegal reentry into the United States was entitled to present defense that he mistakenly believed he was a United States citizen at the time of his attempted entry); People v. Rivera, 203 Cal. Rptr. 842 (Cal. Ct. App. 1984) (defendant's belief that victim consented to sexual advances was a defense to rape); State v. Mainaaupo, 178 P.3d 1 (Haw. 2008) (defendant prosecuted for unauthorized control of a motor vehicle could assert that he mistakenly believed that the person who authorized his operation of the vehicle was the vehicle's owner); General v. State, 789 A.2d 102 (Md. 2002) (defendant charged with failing to remain at the scene of an accident resulting in injury or death was entitled to introduce defense that he believed he had struck a white bag and not a person); Reese v.

State, 745 P.2d 1146 (N.M. 1987) (defendant not guilty of assaulting a police officer if he believed the victim was an ordinary citizen because the offense required knowledge that the victim was a police officer). Indeed, the underlying purpose for the mistake-of-fact doctrine is to protect from prosecution actors who are not morally culpable. See Barlow v. United States, 32 U.S. 404, 411 (1833) (likening mistakes of fact to accidents "consistent with entire innocence of intention"). Mardirosian cannot and does not claim that he acted innocently. He concedes that his conduct satisfied all elements of the crime with which he is charged, but beseeches us to find that his subsequent mistake of fact ended his crime and placed him beyond the law's reach.

We know of no case -- certainly none has been cited by the parties -- that has recognized a mistake-of-fact defense once all elements of the crime have been met. Although we are hesitant to announce categorically that we would never extend the doctrine, the facts of this case illustrate why we would be reluctant to do so, and why we will not do so here. Were we to recognize subsequent mistakes of fact, sophisticated criminals would have the incentive to generate reasons to believe that their conduct is no longer wrongful. Like Mardirosian, some might seek to "contract" with their victims and could use more violent means of persuasion. We could not countenance such a result.[5]

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[5] We stress that there remains a simple way to bring an end to the unlawful possession of stolen property. Mardirosian need only have returned the six paintings to their owner. Had he done so, his crime would have ended, and the five-year statute of limitations would have begun to run. See 18 U.S.C. § 3282.

The possession and concealment of stolen property is a continuous crime. U.S. v. Frezzo, 659 F. Supp. 54, 57–58 (E.D. Pa. 1987) (interpreting 18 U.S.C. § 2315). We agree with the district court that the jury's finding that Mardirosian knew the paintings were stolen at some point after taking possession of them was sufficient to satisfy 18 U.S.C. § 2315's mens rea requirement.

### B. Jury Instructions

Mardirosian also challenges the jury instructions provided at trial for the same reasons underpinning his sufficiency claims. The trial judge instructed the jury that if the government proved all five elements of 18 U.S.C. § 2315 were satisfied, and "that any possession of stolen paintings by Mr. Mardirosian was not for the purpose of exchanging them for a reward that had been offered or that he actually believed had been offered," the 1999 Agreement did not provide Mardirosian with a valid defense.[6] Mardirosian claims

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[6] Mardirosian objected specifically to the following instructions:

> [T]he fifth thing the Government must also prove beyond a reasonable doubt is that Mr. Mardirosian knew that any paintings he possessed in Massachusetts had at some time previously been stolen. It would be sufficient for the Government to prove that Mr. Mardirosian knew that any painting he possessed had been stolen in about 1978. . . .
>
> [T]he law does not permit a person to benefit from his own illegal conduct. Therefore, the 1999 contract would not provide Mr. Mardirosian with a defense to the charge against him. The question of whether Mr. Bakwin entered into the 1999 contract as a result of coercion or duress might be important in a private civil suit between

that the instructions improperly stated the law, in that they prevented the jury from considering whether the 1999 Agreement altered the character of the stolen property or vitiated Mardirosian's mens rea. We review de novo claims that an instruction embodied an error of law. United States v. Nascimento, 491 F.3d 25, 33-34 (1st Cir. 2007).

We make short work of Mardirosian's claim. The jury instructions were consistent with our holding above that the 1999 Agreement had no bearing on the "stolen" character of the paintings or on whether Mardirosian possessed the requisite mens rea to be convicted under 18 U.S.C. § 2315. These instructions provided a clear, accurate description of the substantive law.

### C. Words used to describe the 1999 Agreement

As a final attack on his conviction, Mardirosian challenges the district court's decision to allow Bakwin and the government to use certain words to

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Mr. Bakwin and Mr. Mardirosian, but it is not a question that makes a difference in this criminal prosecution of Mr. Mardirosian by the United States, nor does it make a difference whether or not Mr. Mardirosian honestly believed that in view of the 1999 contract, his conduct after March 8, 2002 violated Federal law. If the Government proves beyond a reasonable doubt the first five elements of the crime charged in Count 1 and it also proves that any possession of stolen paintings by Mr. Mardirosian was not for the purpose of exchanging them for a reward that had been offered or that he actually believed had been offered before he possessed them, the 1999 agreement involving Mr. Bakwin does not provide him with a valid defense to Count 1.

characterize Mardirosian's actions in connection with the 1999 Agreement.

Specifically, Mardirosian objects to Bakwin's description of the 1999 Agreement at trial as "extortion" and "something like kidnaping." Bakwin testified that his initial response to the proposed 1999 Agreement was to tell Radcliffe that it was "extortion, but if we can get the painting back that way, I can't believe that we could not also get the other six paintings." Later, when asked why he entered into the agreement, Bakwin stated, "Well, first of all, I wanted desperately to get the paintings back, and second of all, I felt that this was just extortion, and he had no right to the six other paintings. . . . I felt it was something like kidnaping."

Mardirosian also objects to the government's repeated use of the word "ransom" to describe the terms of the 1999 Agreement during its opening and closing statements.

**1. Bakwin's testimony**

Mardirosian argues on appeal that Bakwin's characterization of the 1999 Agreement had no probative value in proving the criminal offense charged, in light of the district court judge's ruling that the role of duress in the execution of the agreement had no bearing on Mardirosian's criminal trial. Because its prejudicial impact outweighed its probative value, he contends, the testimony should have been excluded under Rule 403 of the Federal Rules of Evidence.

Mardirosian did not object to Bakwin's testimony on relevance grounds at trial. He objected to Bakwin's statement to Radcliffe as hearsay and raised only general objections to the remainder of the disputed testimony. These objections were insufficient to preserve Mardirosian's challenge to the evidence's probative value on appeal. See United States v. Carrillo-Figueroa, 34 F.3d 33, 39 (1st Cir. 1994) ("Unless the basis for objection is apparent from the context, the grounds for objection must be specific so that the trial court may have an opportunity to address the claim later sought to be presented on appeal."); see also, United States v. Mercado, 412 F.3d 243, 247 (1st Cir. 2005) ("It is well established that an objection on one ground does not preserve appellate review of a different ground.").

Our review is therefore o ly for plain error. To prevail under this standard, Mardirosian must show that "(1) an error occurred, (2) the error was clear or obvious, (3) the error affected his substantial rights, and (4) the error also seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Medina-Martinez, 396 F.3d 1, 8 (1st Cir. 2005).

We note that Bakwin's testimony was in fact highly relevant to the prosecution's case. A central theme of Mardirosian's defense at trial was that the 1999 Agreement was a valid agreement between sophisticated business people and represented Mardirosian's good faith effort to return the stolen paintings to Bakwin. Bakwin's testimony undermined these arguments by suggesting that Bakwin did not enter into the agreement willingly. The testimony was also important to the government's case in that it

provided proof that Mardirosian did not seek through the 1999 Agreement to return the paintings for a reward that he actually believed had been posted. As we find no error occurred, Mardirosian's claim fails.

**2. The government's use of the word "ransom"**

Mardirosian claims that the government's use of the word "ransom" to describe the negotiations surrounding the 1999 Agreement was unfair and prejudicial. We review the propriety of the government's opening and closing statements de novo. See United States v. Carpenter 494 F.3d 13, 22 (2007), cert. denied, 128 S.Ct. 1442 (2008). That said, we give much deference to the trial judge's determinations regarding the "accuracy in description, threat of unfair prejudice, frequency of use, and alternative means of description." United States v. Felton, 417 F.3d 97, 103 (1st Cir. 2005).

We think the term "ransom," while highly provocative, accurately describes the nature of the 1999 Agreement. A "ransom" is defined as "a consideration demanded for the release of someone or something from captivity." Merriam-Webster's Collegiate Dictionary 965 (10th ed. 1993). Mardirosian demanded that Bakwin deed him title to the six paintings in question before he would release the stolen Cézanne. His demand neatly fit the definition of a "ransom," and the government did not improperly use the term. See Felton, 417 F.3d at 103 (finding that the government's use of the term "terrorist" to describe the defendants and their actions was "highly pejorative," but that this was "a function of the acts that the defendants engaged in, not the government's inaccurate description of those acts").

**D. Sentencing claims**

Finally, Mardirosian challenges the district court's assessment of a 22-level sentencing enhancement for the value of the paintings, based on its calculation that Mardirosian's offense resulted in an overall loss of $30.2 million. Mardirosian maintains that the $29 million Cézanne should not have been included in the loss calculation, because he returned it before his offense was detected. The six remaining paintings combined were worth at most $1.2 million, which would have yielded a 14-level enhancement. In the alternative, Mardirosian objects to the court's use of the Cézanne's 1999 auction price to determine its value.

We review the trial judge's interpretation of the Sentencing Guidelines de novo and findings of fact for clear error. United States v. Ortiz-Torres, 449 F.3d 61, 72 (1st Cir. 2006).

Mardirosian relies on the language of Application Note 3(E) of the commentary to section 2B1.1 of the 2004 Sentencing Guidelines in arguing that the Cézanne should have been excluded entirely from the loss calculation. Application Note 3(E) instructs the trial court to reduce its loss calculation by the "fair market value" of property returned to the victim "before the offense was detected."[7] The district court

---

[7] Application Note 3(e) provides:

> Credits Against Loss. -- Loss shall be reduced by the following:
>
> (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the

determined that "detection of the offense" occurred in 1978, when Bakwin discovered that his paintings had been stolen. Mardirosian asks us to adopt a different reading; he argues that the offense was not detected until January 2006, when he was identified as the perpetrator.

Mardirosian's reading of "offense" to refer to the discovery of the identity of the perpetrator distorts the plain meaning of the word. The Sentencing Commission's commentary is to be "read in a straightforward, commonsense manner." United States v. Carrasco-Mateo, 389 F.3d 239, 244 (1st Cir. 2004). The sensible reading of "offense" is that it refers to the crime itself, not the discovery of the perpetrator. Thus, credit for the return of property under Application Note 3(e) is only available if the property is returned before either the victim or law enforcement becomes aware of the crime.[8]

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> defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (*I*) the time the offense was discovered by a victim or government agency; or (*II*) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.
> U.S.S.G. § 2B1.1 cmt. n. 3(e)(emphasis added).

[8] We find further support for this interpretation in the fact that other circuits, in describing the moment of detection under Application Note 3(e), have focused on the detection of the crime rather than on the discovery of the perpetrator's identity. See, e.g., United States v. Austin, 479 F.3d 363, 370 (5th Cir. 2007) (observing that an offense is detected under the Guidelines commentary when the government "discovers the fraud")(emphasis added); United States v. Mau, 45 F.3d 212, 216 (7th Cir. 1995) (defining the time to determine a loss in a check

Moreover, crediting Mardirosian with the return of the Cézanne would ignore the gravity of his crime. The Sentencing Guidelines treat loss "as a proxy for the seriousness of the [defendant's] fraud." Austin, 479 F.3d at 369. Mardirosian concealed the Cezanne for 20 years, and it was only after he realized that he could not sell the stolen painting without being caught that he reached out to Bakwin to negotiate over its return. Even then, he conditioned the Cezanne's return on the transfer of title to the six other paintings. Mardirosian is not entitled to a credit for this behavior that would place him on the same plane as a repentant thief who returned stolen property before the owner even noticed its absence.[9]

Nor do we find that the district court erred in calculating loss under Section 2B1.1 of the Sentencing Guidelines by assigning the Cézanne the value of its 1999 auction price. Mardirosian contends that the court should have assigned the Cézanne its 1978 value, because courts should not consider the appreciated value of stolen property in calculating loss.

---

kiting scheme as the moment the loss is discovered) (emphasis added); United States v. Swanson, 360 F.3d 1155, 1169 (10th Cir. 2004) (pinpointing the date of detection as "the date of discovery of the fraud")(emphasis added).

[9] Mardirosian argues that our reading of Application Note 3(e) will provide a windfall to white-collar criminals who can conceal their crimes because they will have a longer window to claim credits for returning property to their victims than robbers or burglars whose crimes are detected immediately. While we do not dispute that this may be true, we see no problem with this result. A defendant's opportunities to mitigate his crime, just like the punishment itself, are the product of the crime he has chosen to commit.

Mardirosian cites two cases for this proposition: United States v. Trupin, 117 F.3d 678 (2d Cir. 1997), and United States v. Paley, 442 F.3d 1273 (11th Cir. 2006).

As a preliminary matter, we do not agree with the government that Mardirosian waived this issue on appeal. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") Mardirosian's development of his claim on appeal -- though brief -- was enough to alert us to his precise challenge.

But although Mardirosian's claim overcomes this first hurdle, it collapses on the merits. Neither of the cases Mardirosian cites supports the conclusion that the district court's calculation of loss was clearly erroneous. In Trupin, the Second Circuit found that the district court, in calculating loss, did not abuse its discretion in assigning a stolen painting its value at the time of theft rather than at the time the defendant had last possessed it. The Second Circuit held that the district court had reasonably analogized the painting's appreciation to accrued interest, which was excluded from the loss calculation under an older version of Application Note 2 to Section 2B1.1.[10] At the same time, it emphasized that it was not holding that "as a matter of law, appreciation in value cannot be considered when calculating loss," and it observed that

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[10] This concept is now found in Application Note 3(D)(i), which excludes from loss calculation "[i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs."

"a district court could properly go either way on this question." Id. Paley is inapposite here, as it examines the calculation of value under the sentencing guideline for money-laundering, an entirely different provision, Section § 2S1.1.[11]

Mardirosian further asserts that the 1999 auction price in particular is an unfair measure of Bakwin's loss and his culpability, because it was not reasonably foreseeable that the Cézanne would appreciate almost 50-fold between 1978 and 1999. We disagree. It is entirely foreseeable that a painting by a famous artist would appreciate with time, even if Mardirosian did not know by exactly how much. That the painting's value would grow exponentially was a risk he assumed when he concealed the painting for two decades. It is not a reason to disturb the district court's ruling on appeal. The district court's use of the Cézanne's 1999 auction price in its calculation of loss was not clearly erroneous.

---

[11] The Eleventh Circuit in Paley based its interpretation of Section 2S1.1 in large part on a 2001 revision that changed the relevant term for sentence calculation purposes from "the value of the funds" to "the value of the laundered funds." This insertion of the modifier "laundered," the court found, signified that the funds to be considered for sentencing purposes were "those that were actually laundered." Mardirosian does not make a similar textual argument with respect to Section 2B1.1, nor is one readily apparent.

## III. Conclusion

For the reasons provided above, we affirm the conviction and sentence.

**AFFIRMED.**

**United States Court of Appeals**
**For the First Circuit**

**No. 09-1144**

**[Filed April 14, 2010]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Appellee, | ) |
| | ) |
| v. | ) |
| | ) |
| ROBERT M. MARDIROSIAN, | ) |
| | ) |
| Defendant, Appellant. | ) |
| | ) |

**JUDGMENT**

Entered: April 14, 2010

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The conviction and sentence of Robert M. Mardirosian are affirmed.

By the Court:

/s/ Margaret Carter, Clerk

* * *

## APPENDIX B

AO 245B(05-MA)
(Rev. 06/05) Judgment in a Criminal Case
Sheet 1 - D. Massachusetts - 10/05

**UNITED STATES DISTRICT COURT**
**District of Massachusetts**

**Case Number: 1: 07 CR 10075 - 001 - MLW**
**USM Number: 26408-038**

**[Filed December 16, 2008]**

| | |
|---|---|
| UNITED STATES OF AMERICA | ) |
| | ) |
| V. | ) |
| | ) |
| ROBERT MARDIROSIAN | ) |
| | ) |

**JUDGMENT IN A CRIMINAL CASE**

Jeanne Kempthorne, Esq & Brian Fitrzsimmons, Esq.
Defendant's Attorney
☑ Additional documents attached

**THE DEFENDANT:**

* * *

☑ was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 2315 | Possession, Concealment, or Storage of Stolen Goods | 04/11/05 | 1 |

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in the economic circumstances.

12/15/08
Date of Imposition of Judgment

/s/ Mark L. Wolf
Signature of Judge

The Honorable Mark L. Wolf
Chief Judge, U. S. District Court
Name and Title of Judge

December 16, 2008
Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 84 month(s).

☑ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a B.O.P. facility equipped to handle any physical or psychological needs of the defendant.

☑ The defendant is remanded to the custody of the United States Marshal.

* * *

**SUPERVISED RELEASE**
**☑ See continuation page**

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 36 month(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 tests per year, as directed by the probation officer.

* * *

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

* * *

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**ADDITIONAL ☑ SUPERVISED RELEASE**
**☐ PROBATION TERMS**

The defendant is to pay any outstanding balance of the fine according to a court ordered repayment schedule.

The defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

The defendant is to provide the probation officer access to any requested financial information which may be shared with the U.S. Attorney's Office.

**Continuation of Conditions of**
**☐ Supervised Release ☐ Probation**

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **TOTALS:** | $100.00 | $100,000.00 | $0.00 |

* * *

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| Michael Bakwin | 6 paintings | The return of the six paintings | |
| **TOTALS:** | $0.00 | $0.00 | |

* * *

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

* * *

**B** ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

* * *

**F** ☒ Special instructions regarding the payment of criminal monetary penalties:

If the defendant is unable to pay the full amount of the fine at this time any outstanding balance shall be paid during his term of supervised release on a court ordered repayment schedule.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

## STATEMENT OF REASONS

### I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

* * *

B ☑ **The court adopts the presentence investigation report with the following changes.**
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.) (Use Section VIII if necessary.)

1 ☑ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):
As section 2B1.1 resulted in a higher range than section 2B1.5 where it was properly applied, it was used. The range was 30.

2 ☑ **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):
Two points were added for perjury constituting obstruction of justice pursuant to section 3C1.1.

* * *

**III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):**

Total Offense Level: 32
Criminal History Category: I
Imprisonment Range: 121 to 151 months
Supervised Release Range: 2 to 3 years
Fine Range: $17,500 to $ 1,893,000
☐ Fine waived or below the guideline range because of inability to pay.

**IV ADVISORY GUIDELINE SENTENCING DETERMINATION** (Check only one.)

* * *

D ☑ **The court imposed a sentence outside the advisory sentencing guideline system.** (Also complete Section VI.)

* * *

**VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM** (Check all that apply.)

A **The sentence imposed is** (Check only one.):
☑ below the advisory guideline range

* * *

B **Sentence imposed pursuant to** (Check all that apply.):

* * *

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

* * *

☑ defense motion for a sentence outside of the advisory guideline system to which the government did not object

* * *

D Explain the facts justifying a sentence outside the advisory guideline system. (Use Section VIII if necessary.)

The court denied the defendant's motion for a sentence of two years home confinement. However, because the defendant is 74 years old and in the early stage of what may be progressive dementia his time in prison will be unusually difficult and, therefore, a sentence of seven years incarceration was deemed sufficient and no more than necessary to serve the statutory purposes of sentencing.

## VII COURT DETERMINATIONS OF RESTITUTION

* * *

B Total Amount of Restitution: Return of six stolen paintings.

* * *

## VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

This court recognizes its authority to award expenses incurred by the victim during participation in the investigation and prosecution of the offense. See 18 U.S.C. 3663A(b)(4). However, the majority of the expenses sought related to the stolen Cezzane and because that painting was only relevant conduct, restitution relating to it could not be awarded. See Hughey, 495 US 411 (1990). The evidence presented was insufficient to permit the court to determine what

part of the remaining claimed expenses related to this case. As it would require lengthy and complicated proceedings, which were not requested, to make this determination, and because there is civil litigation in which such costs may be recovered, no restitution for such expenses was awarded. See 18 U.S.C. 3663 (a)(1)(B)(ii).

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: 000-00-3553

Defendant's Date of Birth: 00/00/1934

Defendant's Residence Address: E. Falmouth, MA

Defendant's Mailing Address: Same

Date of Imposition of Judgment
12/15/08

/s/ Mark L. Wolf
Signature of Judge

The Honorable Mark L. Wolf
Chief Judge, U.S. District Court
Name and Title of Judge
Date Signed December 16, 2008

# APPENDIX C

## STATUTES, RULES, AND OTHER AUTHORITY

**Restatement (Second), Conflict of Laws 2d, § 187 (rev. 1989)**

Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

**Restatement (Second), Contracts 2d, § 174 (1981)**

When Duress by Physical Compulsion Prevents Formation of a Contract

If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.

**Restatement (Second), Contracts 2d, § 175 (1981)**

When Duress by Threat Makes a Contract Voidable

(1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

(2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

**Restatement (Second), Contracts 2d, § 176 (1981)**

When a Threat Is Improper

(1) A threat is improper if

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad faith, or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or

(c) what is threatened is otherwise a use of power for illegitimate ends.

**Restatement (Second), Contracts 2d, § 176, Illustration 1 (1981)**

A is a good faith purchaser for value of a valuable painting stolen from B. When B demands the return of the painting, A threatens to poison B unless he releases all rights to the paintings for $1,000. B, having no reasonable alternative, is induced by A's threat to sign the release, and A

pays him $1,000. The threatened act is both a crime and a tort, and the release is voidable by B.

**Swiss Code of Obligations, Contract Law, Art. 29-31**

Volume I
Contract Law

First Division: General Provisions
First Title: Origin of Obligations
First Chapter: Originating from Contract

* * *

Art. 29

III. Duress
1. Conclusion of contract

[1] Where a contracting party has been unlawfully forced to conclude a contract while under material duress, whether originating from the other party or a third person, the party who acted under duress is not bound by the contract.

[2] If the duress was caused by a third person, the party under duress who wishes to avoid the contract shall, where required by equity, compensate the other party if such other party did not know nor should have known of such duress.

Art. 30

2. Material duress

[1] Duress is deemed to be material if, under the circumstances, the threatened party is justified in assuming that imminent and serious danger threatens the life, body, honor or fortune of either himself or a person close to him.

[2] Threat of enforcement of a legal right shall be disregarded unless the distress (Art. 21) of the person subject to the threat has been used to extort excessive advantages from him.

Art. 31

IV. Waiver of defect by ratification of contract

[1] If the party influenced by error (Art. 23 et seq.), deception (Art. 28), or duress (Arts. 29, 30), within one year, neither declares to the other party that he is not bound by the contract nor demands restitution, then the contract is deemed to be ratified.

[2] Such period runs, in the event of error or deception, from the time of its discovery and, in the event of a threat, from the time of its removal.

[3] Ratification of a contract which, due to deception or threat, was voidable, does not itself bar a claim for damages.

* * *